Jasmine bt Mohd Haneef v Amanda Jayne Spinks and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)-2417–12 OF 2019 AND W-02(IM)-2332–12 OF 2019
KAMARDIN HASHIM, YAACOB MD SAM AND NOR BEE ARIFFIN JJCA
21 JUNE 2021

Family Law — Separation — Judicial — Petition on ground of adultery — Appellant cited as co-respondent for alleged adultery — Whether fact that appellant was a Muslim barred respondent from citing as co-respondent — Whether sub-s 3(3) excluded Muslims from the civil court jurisdiction — Whether claim for damages on ground of adultery applicable only in divorce petitions — Whether claim for damages was applicable in petition for judicial separation — Law Reform (Marriage and Divorce) Act 1976 s 58

Statutory Interpretation — Section 3(3) — Law Reform (Marriage and Divorce) Act 1976 — Construction of statutes — Construction of provisions involving jurisdiction of court — Whether the Act excludes all Muslims — Whether provision should be read conjunctively or disjunctively — Whether rule of noscitur a sociis applies — Intention of Parliament — Whether provision was plain, unambiguous and unequivocal — Whether provision should be construed literally

The respondent in Appeal No W-02(IM)-2417–12 of 2019 ('Appeal 2417') had filed a petition for judicial separation ('petition for JS') against her husband and cited the appellant who was a Muslim as a co-respondent, alleging that the appellant had committed adultery with her husband and should be condemned in damages pursuant to s 58 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). The appellant applied to strike out the petition ('encl 15') and prayed that certain paragraphs of the petition be expunged on the grounds that: (a) sub-s 3(3) of the Act provides, inter alia, that the Act did not apply to a Muslim; and (b) s 58 of the Act provides that a claim for damages against a co-respondent on the ground of adultery was only in respect of a petition for divorce and not in cases where the relief sought was for a judicial separation. At the conclusion of the hearing of encl 15, the High Court judge ('HCJ') allowed the appellant's application and the petition for JS was struck out against the appellant on the basis that the respondent's action in citing the appellant as a co-respondent in the petition for JS was scandalous, frivolous or vexatious and was an abuse of the process of court, the reason being under s 58 of the Act, only in a petition for divorce could an alleged adulterer or adulteress be made a co-respondent and damages for adultery be claimed against the said

co-respondent. An alleged adulterer or adulteress could not be cited as a co-respondent in a petition for JS. The HCJ further held that the fact that an alleged adulterer or adulteress was a Muslim was not a bar against him/her being named as a co-respondent in a divorce petition and damages for adultery to be claimed against him/her under s 58 of Act 164. In other words, the HCJ found that the appellant was not exempted from the application of sub-s 3(3) of the Act. Dissatisfied, the appellant appealed against the decision that the High Court had jurisdiction over a Muslim under the Act vide Appeal 2417 and the respondent appealed against the decision that allowed the appellant's application to strike out the petition for JS on the basis that pursuant to s 58 of the Act, a co-respondent could not be cited therein vide Appeal No W-02(IM)-2332–12 of 2019 ('Appeal 2332').

Held, allowing Appeal 2417 with costs and dismissing Appeal 2332 with costs:

(1) The clear, categoric and mandatory language of the first part of sub-s 3(3) is a blanket exclusion of Muslims from the entire Act. In short, the civil court do not have jurisdiction over Muslims by virtue of this provision. The only exception where the civil court would have jurisdiction over a Muslim is expressly set out in the third part of sub-s 3(3), ie where it was a non-Muslim who, subsequent to their civil marriage, had converted to Islam. The above was the ordinary and plain meaning of sub-s 3(3) of the Act. There could not be any other meaning attributed to it (see paras 42 & 44–45).

(2) The language of sub-s 3(3) of the Act is plain, unambiguous and unequivocal. There was nothing difficult about understanding the language used. Equally clear was the purpose for which the Act was enacted as stipulated in the long title as 'an Act to provide for monogamous marriages and the solemnisation and registration of such marriages; to amend and consolidate the law relating to divorce and to provide for matters incidental thereto'.Thus, the legislative intent of sub-s 3(3) must be construed within the framework and the general purpose as stipulated in the long title to the Act which was to specify the persons to whom the Act applied or did not apply (see paras 53–55).

(3) The rule of construction that should have been considered by the judge was the literal interpretation. Instead, the judge chose to embark on the purposive approach without providing reasons for the same. The interpretation of the words 'This Act shall not apply to a Muslim' must necessarily mean the Muslim marriages, was erroneous. The interpretation of sub-s 3(3) by the learned judge obviously ran contrary to the legislative intent of the Parliament. This was further fortified by the word 'or' appearing immediately after the words 'This Act shall not apply to a Muslim' and before the words 'to any person who is married under Islamic law.' The word 'or' meant that the two phrases must be read

disjunctively. By reading it disjunctively, it was by no means clear that the first part referred to a Muslim, whether he or she was married or not. In interpreting interpretative issue, every word and provision found in a statute was supposed to have a meaning and a function and for some useful purpose. Parliament did not waste its words or to say anything in vain. Thus, any argument on any words or provisions in sub-s 3(3) being superfluous was untenable (see paras 57–58, 61, 70–71, 73 & 76).

(4) In the face of an express provision to exclude the appellant from the application of the Act, there was no legal basis for the judge to say that it may not have been in the contemplation of Parliament when it enacted the Act of a state of affairs where a married non-Muslim committed adultery with a Muslim. Likewise, there was also no legal basis to presume that Parliament did not intend to exclude from the Act the ability to seek damages from adulterers in a divorce petition, just by reason of their religion or that Parliament did not intend to legislate in violation of any rights under the Federal Constitution (see para 77).

(5) The meaning of the ordinary and plain words 'This Act shall not apply to a Muslim', have been strained to such an extent so as to deprive the appellant from taking refuge under sub-s 3(3). The rule of construction of Rayuan 2417 may be useful in other contexts but not for the present purpose when the words of the statute clearly spoke to the intention of the Legislature. The court entrusted to interpret the law passed by Parliament as it stands and no other. The judge had used the purposive approach to arrive at an interpretation manifestly not intended to by Parliament and in doing so, had rewritten or substituted words in sub-s 3(3) with words not in existence (see para 78).

(6) The result may sound harsh, unjust or undesirable but decided cases demonstrated that the judicial policy of this country is not to usurp the legislative role of Parliament but confined the province of the courts only to expounding the law. The court was duty bound to give effect to the clear and explicit words of sub-s 3(3) of the Act. If the result was unfortunate, it was entirely within the power of the Legislature to take the necessary action to remedy the defects of the law as enacted, and it was not for the courts to usurp the function of the Legislature by straining the meaning of the clear terms of the law seeking to evade the consequences which may ensue. The making or unmaking of the law was a matter within the exclusive domain of Parliament (see paras 79 & 82).

[Bahasa Malaysia summary

Responden dalam Rayuan No W-02(IM)-2417–12 Tahun 2019 ('Rayuan 2417') telah memfailkan petisyen untuk pemisahan kehakiman ('petisyen untuk JS') terhadap suaminya dan menamakan perayu yang beragama Islam sebagai responden bersama, mendakwa bahawa perayu telah berzina dengan

suaminya dan harus dihukum ganti rugi menurut s 58 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut'). Perayu memohon untuk membatalkan petisyen tersebut ('lampiran 15') dan memohon agar perenggan-perenggan tertentu petisyen tersebut dikeluarkan dengan alasan bahawa: (a) sub-s 3(3) Akta tersebut memperuntukkan, antara lain, bahawa Akta tersebut tidak terpakai untuk seorang Muslim; dan (b) s 58 Akta tersebut memperuntukkan bahawa tuntutan ganti rugi terhadap responden bersama atas alasan penzinaan hanyalah berkenaan dengan petisyen perceraian dan bukannya dalam kes di mana relif yang dimohon adalah untuk pemisahan kehakiman. Ketika keputusan pendengaran lampiran 15, hakim Mahkamah Tinggi ('HCJ') membenarkan permohonan perayu dan petisyen untuk JS dibatalkan terhadap perayu dengan alasan tindakan responden dalam menamakan perayu sebagai responden bersama dalam petisyen untuk JS adalah bersifat skandal, remeh atau menyusahkan dan merupakan satu penyalahgunaan proses mahkamah, dengan alasan bahawa di bawah s 58 Akta tersebut, hanya dalam petisyen perceraian seseorang yang didakwa berzina boleh dijadikan responden bersama dan ganti rugi untuk berzina dituntut terhadap responden bersama tersebut. Seorang yang didakwa berzina tidak boleh dinamakan sebagai responden bersama dalam petisyen JS. HCJ selanjutnya memutuskan fakta bahawa seseorang yang dituduh berzina adalah seorang Muslim tidak melarang beliau dinamakan sebagai responden bersama dalam petisyen perceraian dan ganti rugi bagi penzinaan dituntut terhadapnya di bawah s 58 Akta 164. Dengan kata lain, HCJ mendapati bahawa perayu tidak dikecualikan daripada penggunaan sub-s 3(3) Akta tersebut. Tidak berpuas hati, perayu memfailkan rayuan terhadap keputusan bahawa Mahkamah Tinggi mempunyai bidang kuasa ke atas seseorang Muslim di bawah Akta tersebut melalui Rayuan 2417 dan responden merayu terhadap keputusan yang membenarkan permohonan perayu untuk membatalkan petisyen JS dengan alasan bahawa berdasarkan s 58 Akta tersebut, responden bersama tidak harus dinamakan melalui Rayuan No W-02(IM)-2332–12 tahun 2019 ('Rayuan 2332').

Diputuskan, membenarkan Rayuan 2417 dengan kos dan menolak Rayuan 2332 dengan kos:

(1) Bahasa yang jelas, kategorik dan mandatori bahagian pertama sub-s 3(3) adalah pengecualian menyeluruh seseorang Muslim dari keseluruhan Akta tersebut. Pendek kata, mahkamah sivil tidak mempunyai bidang kuasa ke atas seseorang Muslim berdasarkan peruntukan ini. Satu-satunya pengecualian di mana mahkamah sivil mempunyai bidang kuasa ke atas seorang Muslim telah dinyatakan secara tersirat dalam bahagian ketiga sub-s 3(3), iaitu di mana seseorang bukan Muslim yang, setelah perkahwinan sivil mereka, telah memeluk Islam. Ianya adalah makna biasa dan jelas sub-s 3(3) Akta tersebut. Tidak ada makna lain yang dikaitkan dengannya (lihat perenggan 42 & 44–45).

(2) Bahasa sub-s 3(3) Akta tersebut jelas, tidak harfiah dan tegas. Tidak ada apa yang sukar untuk difahami berdasarkan bahasa yang digunakan. Sama rata jelas adalah tujuan di mana Akta tersebut digubal seperti yang diperuntukkan dalam tajuk panjang sebagai 'suatu Akta untuk mengadakan peruntukan berkenaan dengan perkahwinan monogami dan pengupacaraan dan pendaftaran perkahwinan itu; untuk meminda dan menyatukan undang-undang yang berhubungan dengan perceraian; dan untuk mengadakan peruntukan bagi perkara-perkara bersampingan dengannya'. Oleh itu, tujuan perundangan sub-s 3(3) harus ditafsirkan dalam kerangka dan tujuan umum sebagaimana yang diperuntukkan dalam tajuk panjang Akta tersebut yang bertujuan untuk mengenalpasti seseorang yang mana Akta tersebut terpakai atau tidak terpakai (lihat perenggan 53–55).

(3) Peraturan penggubalan yang seharusnya dipertimbangkan oleh hakim adalah tafsiran literal. Sebaliknya, hakim memilih untuk memulakan pendekatan bertujuan tanpa memberikan alasan terhadapnya. Tafsiran perkataan 'Akta ini tidak terpakai bagi seorang Muslim' semestinya bermaksud perkahwinan orang Islam, adalah terkhilaf. Tafsiran sub-s 3(3) oleh hakim yang bijaksana jelas bertentangan dengan niat perundangan Parlimen. Ia diperkuatkan lagi dengan perkataan 'atau' yang muncul serta merta setelah perkataan 'Akta ini tidak terpakai bagi seorang Muslim' dan sebelum kata-kata 'kepada mana-mana orang yang berkahwin di bawah undang-undang Islam'. Perkataan 'atau' bermaksud bahawa kedua-duanya frasa mesti dibaca secara berasingan. Dengan membacanya secara berasingan, ia adalah jelas bahawa bahagian pertama merujuk kepada seorang Muslim, sama ada beliau sudah berkahwin atau tidak. Dalam menafsirkan isu penafsiran, setiap kata dan peruntukan yang terdapat dalam undang-undang seharusnya mempunyai makna dan fungsi dan untuk beberapa tujuan yang berguna. Parlimen tidak membazirkan kata-katanya atau mengatakan sesuatu yang sia-sia. Oleh itu, sebarang pendapat mengenai kata-kata atau peruntukan dalam sub-s 3(3) menjadi berlebihan tidak dapat dipertahankan (lihat perenggan 57–58, 61, 70–71, 73 & 76).

(4) Pada permukaan peruntukan yang tersurat untuk mengecualikan perayu dari penggunaan Akta tersebut, tidak ada asas perundangan bagi hakim untuk mengatakan bahawa hal tersebut mungkin tidak ada dalam pertimbangan Parlimen apabila ia menggubal Akta di mana orang bukan Islam yang sudah berkahwin berzina dengan orang Islam. Demikian juga, tidak ada asas perundangan untuk menganggap bahawa Parlimen tidak berniat untuk mengecualikan dari Akta tersebut kemampuan untuk menuntut ganti rugi dari penzina dalam petisyen perceraian, atas alasan bahawa agama mereka atau bahawa Parlimen tidak berniat untuk menggubal undang-undang yang melanggar sebarang hak di bawah Perlembagaan Persekutuan (lihat perenggan 77).

(5) Makna kata-kata biasa dan jelas 'Akta ini tidak terpakai bagi seorang Muslim', telah dipanjangkan sedemikian rupa sehingga dapat menghalang perayu daripada berlindung di bawah sub-s 3(3). Peraturan penggubalan Rayuan 2417 mungkin berguna dalam konteks lain tetapi tidak untuk tujuan semasa apabila kata-kata perundangan tersebut jelas menyatakan niat badan perundangan. Mahkamah diamanahkan untuk menafsirkan undang-undang yang diluluskan oleh Parlimen sebagaimana yang dinyatakan dan bukannya yang lain. Hakim telah menggunakan pendekatan bertujuan untuk mencapai interpretasi yang jelas tidak dimaksudkan oleh Parlimen dan dengan demikian, telah menulis semula atau mengganti kata-kata dalam sub-s 3(3) dengan kata-kata yang tidak wujud (lihat perenggan 78).

(6) Keputusannya mungkin terdengar kasar, tidak adil atau tidak diingini tetapi kes-kes yang diputuskan menunjukkan bahawa polisi kehakiman negara ini bukan untuk mengatasi peranan perundangan Parlimen tetapi mengehadkan bidang kuasa mahkamah hanya untuk mentafsirkan undang-undang. Mahkamah mempunyai kewajipan terikat untuk melaksanakan perkataan yang jelas dan nyata sub-s 3(3) Akta tersebut. Sekiranya keputusannya tidak memihak, ia sepenuhnya berada di bawah kekuasaan badan perundangan untuk mengambil tindakan yang diperlukan untuk memperbaiki kecacatan undang-undang sebagaimana yang digubal, dan bukan bagi mahkamah mengatasi fungsi badan perundangan dengan menekankan makna terma perundangan yang jelas bertujuan untuk mengelakkan akibat yang mungkin akan berlaku. Penggubalan atau ketidakgubalan undang-undang adalah perkara dalam bidang kuasa eksklusif Parlimen (lihat perenggan 79 & 82).]

Cases referred to

All Malayan Estates Staff Union v Rajasegaran & Ors [2006] 6 MLJ 97; [2006] 4 CLJ 195, FC (refd)

Citibank Bhd v Mohamad Khalid bin Farzalur Rahaman & Ors [2000] 4 MLJ 96; [2000] 3 CLJ 739, CA (refd)

Ding Do Ca, Re [1966] 2 MLJ 220, FC (refd)

Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545; [2018] 3 CLJ 145, FC (refd)

Latifah bte Mat Zin v Rosmawati Bte Sharibun & Anor [2007] 5 MLJ 101, FC (refd)

Lembaga Minyak Sawit Malaysia v Arunamari Plantations Sdn Bhd & Ors and another appeal [2015] 4 MLJ 701; [2015] 7 CLJ 149, FC (refd)

Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)

Majlis Peguam & Anor v Tan Sri Dato' Mohamed Yusoff bin Mohamed [1997] 2 MLJ 271; [1997] 3 CLJ 332, SC (folld)

Malaysia Building Society Bhd v KCSB Konsortium Sdn Bhd [2017] 2 MLJ 557; [2017] 4 CLJ 24, FC (folld)

Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh [2008] MLJU 646; [2008] 6 CLJ 209, FC (refd)
McCormick v Horsepower Ltd [1981] 1 WLR 993, CA (refd)
Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors [2011] 6 MLJ 507, CA (refd)
Pinner v Everett [1969] 3 All ER 257, HL (refd)
Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah [2003] 3 CLJ 690, HC (refd)
Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals [2008] 2 MLJ 147; [2008] 2 CLJ 1, FC (refd)
Tan Sung Mooi (F) v Too Miew Kim [1994] 3 CLJ 708, SC (distd)
Tenaga Nasional Bhd v Pearl Island Resort Development Sdn Bhd [2017] MLJU 1193; [2017] 9 CLJ 185, FC (folld)
Tey Siew Choo v Teo Eng Hua [1999] 6 CLJ 308, HC (refd)
Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals [2016] 1 MLJ 585; [2016] 3 CLJ 505, FC (folld)
Yong Fuat Meng v Chin Yoon Kew [2008] 5 MLJ 226; [2008] 5 CLJ 705, HC (refd)
Zubeydah bte Shaik Mohd lwn Kalaichelvan a/l Alagapan dan lain-lain [2003] 2 MLJ 471; [2003] 8 CLJ 840, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 48
Federal Constitution arts 11(1), 121(1A)
Interpretation Acts 1948 And 1967 ss 17A, 23A(1)
Law Reform (Marriage and Divorce) Act 1976 ss 3, 3(3), 58, 76, 77, Parts VII, VIII
Limitation Act 1953 s 26(2)
National Land Code s 340(2)(b)
Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d)

Appeal from: Judicial Separation Petition WA-33–364–07 of 2019 (High Court, Kuala Lumpur)

Siew Choon Jern (Ong Chern Yii with him) (Douglas Yee) in Civil Appeal No W-02(IM)-2417–12 of 2019 for the appellant.
Ravi Nekoo (Puspha Ratnam and Parvinder Kaur with him) (Hakem Arabi & Assoc) in Civil Appeal No W-02(IM)-2332–12 of 2019 for the appellant.
Siew Choon Jern (Ong Chern Yii with him) (Douglas Yee) in Civil Appeal No W-02(IM)-2332–12 of 2019 for the respondent.
Ravi Nekoo (Puspha Ratnam and Parvinder Kaur with him) (Hakem Arabi & Assoc)in Civil Appeal No W-02(IM)-2417–12 of 2019 for the respondent.

Nor Bee Ariffin JCA:

INTRODUCTION

[1] These appeals arose from a matrimonial dispute. The respondent (in Appeal No W-02(IM)-2417–12 of 2019 (Appeal No 2417)) had filed a petition for judicial separation (Petition for JS) against her husband and cited the appellant who is a Muslim as a co-respondent, alleging that the appellant had committed adultery with her husband and should be condemned in damages pursuant to s 58 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164).

[2] The sole issue to be determined is whether Act 164 applies to a Muslim who is alleged to have committed adultery with a non-Muslim. The issue turns on the construction of sub-s 3(3) of Act 164.

BACKGROUND FACTS

[3] The respondent petitioned that her husband had behaved in a manner that she could not reasonably be expected to live with him, as a result of which their marriage has irretrievably broken down. The particulars of adulterous relationship between the appellant and the respondent's husband were pleaded in paras 40–64 of the petition for JS. The appellant was alleged to have admitted her extra-marital affairs with the respondent's husband. The respondent further pleaded that she had been abandoned by her husband as a result of his adulterous affair with the appellant.

[4] The appellant filed an application to strike out the Petition for JS pursuant to O 18 r 19(1)(a), (1)(b) and/or (1)(c) and/or (1)(d) of the Rules of Court 2012 and/or r 13 of Act 164 and/or the inherent jurisdiction of the court (encl 15) and prayed that paras 40–64 of the petition for JS be expunged and for consequential reliefs, based on two grounds:

(a) sub-s 3(3) of Act 164 provides among others that Act 164 does not apply to a Muslim. The respondent had no cause of action against the appellant as she is a Muslim and have been practising the religion of Islam since birth; and

(b) s 58 of Act 164 provides that a claim for damages against a co-respondent on the ground of adultery is only in respect of a petition for divorce and not in cases where the relief sought is for a judicial separation.

[5] The respondent asserted that the appellant was rightly named as she could not be absolved of her role in breaking the marriage and that her claim against the appellant was for damages for breaking her marriage which is well

within the jurisdiction of a civil court and it had nothing to do with the appellant's personal law.

[6] At the conclusion of the hearing of encl 15, the learned judge allowed the appellant's application and the petition for JS was struck out against the appellant on the basis that the respondent's action in citing the appellant as a co-respondent in the petition for JS was scandalous, frivolous or vexatious and was an abuse of the process of court, the reason being under s 58 of Act 164, only in a petition for divorce can an alleged adulterer or adulteress be made a co-respondent and damages for adultery be claimed against the said co-respondent. An alleged adulterer or adulteress cannot be cited as a co-respondent in a petition for judicial separation.

[7] The learned judge further held that the fact that an alleged adulterer or adulteress is a Muslim is not a bar against him/her being named as a co-respondent in a divorce petition and damages for adultery to be claimed against him/her under s 58 of Act 164. In other words, the learned judge found that the appellant is not exempted from the application of sub-s 3(3) of Act 164.

[8] The appellant appealed in Appeal No 2417 against the decision that the High Court has jurisdiction over a Muslim under Act 164.

[9] The respondent appealed in Appeal No W-02(IM)-2332–12 of 2019 (Appeal No 2332) against the decision that allowed the appellant's application to strike out the petition for JS on the basis that pursuant to s 58 of Act 164, a co-respondent cannot be cited therein.

[10] We heard the two appeals together. We unanimously allowed Appeal No 2417 and dismissed Appeal No 2332.

[11] This judgment will canvass both appeals. We begin with Appeal 2417.

THE HIGH COURT

[12] The learned judge identified in the ground of judgment (GOJ) these issues for determination for Appeal No 2417:

(a) whether Act 164 excludes all Muslims? Or does it only exclude Muslims who are married under Islamic law? Does the LRA apply to a Muslim who is alleged to have committed adultery with a non-Muslim? and

(b) can a petitioner in a joint petition for judicial separation cite an alleged adulterer or adulterous as a co-respondent and claim damages for adultery against him/her?

[13] Relevant to Appeal No 2417 is the issues in paragraph (a). A

[14] There are three issues identified in para (a), namely:

(i) whether Act 164 excludes all Muslims;

(ii) does Act 164 only exclude Muslims who are married under Islamic law? B

(iii) does Act 164 apply to a Muslim who is alleged to have committed adultery with a non-Muslim?

[15] We think the only issue relevant for consideration in this Appeal 2417 C is the first issue in para (i). If the issue in para (i) above is answered in the affirmative, it follows that the other two issues would be rendered redundant. If will also effectively dispose of Appeal 2332. We shall advert to this in later part of this judgement.

D

GROUNDS OF APPEAL

[16] The learned judge was said to have failed to consider the following:

(a) that by virtue of sub-s 3(3) of Act 164, the court has no jurisdiction over the appellant who is a Muslim, thus she was wrongly cited as a party to the petition for JS; E

(b) the word 'or' in sub–s 3(3) of Act 164 which means that the provision must be read disjunctively;

(c) the amendment made by the Joint Select Committee to the original Bill proposed by the Royal Commission on non-Muslim Marriage and Divorce Laws; and F

(d) that s 58 is not one of the specific exceptions under sub-s 3(3) which allows jurisdiction to be extended only to a Muslim convert who was a party to a civil marriage prior to his/her conversion to Islam. G

OUR DECISION

[17] At the outset we need to point out that the construction of sub-s 3(3) of H Act 164 in relation to the non-application of the Act to a Muslim, is not a new issue. Our apex courts and the High Courts have considered and ventilated the same issue. Eventhough in most cases the issues on the application of sub-s 3(3) relate to the conversion to Islam of one spouse to the marriage contracted under Act 164, nevertheless, the decision expounded by the courts are also instructive I to the issue at hand. Some of the case laws are summarised as follows.

[18] The case of *Tan Sung Mooi (F) v Too Miew Kim* [1994] 3 CLJ 708 is a landmark case decided by the Supreme Court on the interpretation of the

application provision in sub-s 3(3) of Act 164. The Supreme Court had comprehensively deliberated and interpreted the ambit and scope of the application section in Act 164. The Supreme Court held in no uncertain terms that sub-s 3(3) provides that the Act shall not apply to Muslims or Muslim marriages and that only non-Muslim marriages may be solemnised or registered under the Act. In short, Act 164 only applies to non-Muslims and non-Muslim marriages.

[19] There are three other Federal Court decisions on the ambit and scope of sub-s 3(3).

[20] The issue before the Federal Court in *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals* [2008] 2 MLJ 147; [2008] 2 CLJ 1 concerns which court has jurisdiction over parties who had contracted civil marriage and over children of the said marriage. The relevant excerpts from the judgment of the court delivered by Nik Hashim FCJ are as follows:

> [34] It was and still is, to employ the term used in s 46(2) of the Islamic Family Law (Federal Territories) Act 1984 (Act 303) ('the Family Law Act'), a 'non-Muslim marriage' governed by the Law Reform Act, which, *according to its s 3(3), does not apply to a Muslim or to any person who is married under Islamic law and under which, according to that section, no marriage where one of the parties is a Muslim may be solemnised or registered. But that section provides for an exception which relates to* s 51 ... The aforesaid exception provided by s 3(3) of the Law Reform Act is that a decree of divorce granted on a petition under s.51 'shall, notwithstanding any other written law to the contrary, be valid against the party who has ... converted to Islam. (Emphasis added.)

[21] In *Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals* [2016] 1 MLJ 585; [2016] 3 CLJ 505, the issue is whether the civil court still retains jurisdiction over the custody of the children of the civil marriage under Act 164 despite the husband's conversion to Islam. The observation by Raus Sharif PCA (as he then was) is instructive:

> [17] The issue is whether the civil court still retains jurisdiction over the custody of the children of the civil marriage under the LRA despite the ex-husband's conversion to Islam. Section 3(3) *of the LRA specifically excludes Muslims from its application except where a petition for a divorce is filed by the non-converting spouse against the converted spouse on the ground of conversion to Islam.* It is provided for under s 51 of the LRA that the conversion to Islam of one spouse can be a ground for the non-converting spouse to petition for divorce and seek ancillary reliefs.
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> ...
>
> [21] Thus, the issue is not new. The civil courts had consistently held that the converted spouse cannot use his conversion to Islam to escape responsibilities under the LRA (also see *Tey Siew Choo v Teo Eng Hua* [1999] 6 CLJ 308, *Kung Lim Siew Wan lwn Choong Chee Kuan* [2003] 6 MLJ 260; [2003] 3 CLJ 482 and *Shama*

Sathiyaseelan v Dr Jeyaganesh C Mogarajah [2004] 2 MLJ 241; [2004] 1 CLJ 505). A

> [22] We have no reason to depart from the earlier decisions. We are of the same view that a non Muslim marriage does not automatically dissolve upon one of the parties converting to Islam. The civil courts continue to have jurisdiction in respect of divorce as well as custody of the children despite the conversion of one party to Islam. B
>
> [23] In the present case, the ex-husband and the ex-wife were Hindus at the time of their marriage. By contracting the civil marriage under the LRA they are bound by its provisions in respect of divorce as well as custody of the children of the marriage ... (Emphasis added.) C

[22] In *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545; [2018] 3 CLJ 145, the appellant and the sixth respondent were married under Act 164. There were three children of the marriage. The sixth respondent converted to Islam and converted the three children to Islam as well. The crux issue in the Federal Court was on the conversion of the three children of the marriage. On sub-s 3(3) of Act 164, Zainun Ali FCJ delivering the judgment of the court held that the civil marriage was still subject to Act 164 notwithstanding one party had converted to Islam. The relevant excerpts from the case are as follows: D E

> [169] In this regard, parallels may be drawn between the GIA and the LRA. Section 3(3) of the LRA likewise excludes the application of the Act to non-Muslims, except in relation to divorce petitions where one party to a civil marriage has converted to Islam ...
>
> [170] It is settled law that conversion does not absolve a person from his antecedent legal obligations (*Kamariah Ali & Yang Lain lwn Kerajaan Negeri Kelantan & satu lagi* [2005] 1 MLJ 197; [2004] 3 CLJ 409 at [37]. Hence, notwithstanding the restrictions in s 3(3) of the LRA, the courts have consistently affirmed their jurisdiction over parties to a civil marriage after the conversion of one partner to Islam, in granting reliefs beyond decrees of divorce ... F G

[23] There are also the High Court decisions on similar subject. In *Tey Siew Choo v Teo Eng Hua* [1999] 6 CLJ 308, the issue in this case is whether the unconverted spouse may file a petition. Suriyadi Halim Omar J (as he then was) observed: H

> Under this Act, *no less than half the Malaysian population in particular the Muslims populace, is outside the purview of the Act.* But not all is lost, as under s 51 of the Act Parliament provides that where one party to a marriage has converted to Islam, the other party who is not a convert (hereinafter interchangeably referred to as the 'unconverted spouse or party') may petition for divorce. The general provision of s 3(3) also clearly provides that the decree of divorce successfully obtained by the unconverted spouse, shall be valid against the converted partner. (Emphasis added.) I

[24] In *Zubeydah bte Shaik Mohd lwn Kalaichelvan a/l Alagapan dan*

lain-lain [2003] 2 MLJ 471; [2003] 8 CLJ 840, the issue in this case is whether the applicant as a Muslim can marry a non-Muslim under Act 164. Raus Sharif J (as he then was) held that s 3(3) of Act 164 prohibits Muslims from marrying or registering their marriage according to the Act. The marriage will be fatal and void if they did so.

[25] In *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah* [2003] 3 CLJ 690, in the preliminary objection posed by the defendant, the issue posed concerns which court has jurisdiction over parties who had contracted civil marriage and over children of the civil marriage. Raus Sharif J (as he then was) ruled:

> ... Dalam memutuskan sama ada mahkamah ini mempunyai bidang kuasa untuk mendengar permohonan plaintif *saya memang sedar akan peruntukan s 3(3) Akta tersebut yang memperuntukkan bahawa Akta tersebut tidak terpakai kepada seseorang yang beragama Islam.* Untuk menjadi jelas, diperuntukkan s 3(3) Akta tersebut yang berbunyi:
>
> > 3(3) This Act shall not apply to a Muslim or to any person who is married under Muslim Law and no marriage of one of the parties professes the religion of Islam shall be solemnised or registered under this Act.
>
> Namun demikian, walaupun defendan sekarang beragama Islam, tetapi fakta kes ini menunjukkan bahawa plaintif dan defendan telah berkahwin di bawah Akta tersebut sebelum defendan memeluk agama Islam. Kesahihan perkahwinan defendan dengan plaintif masih tertakluk di bawah Akta tersebut di mana s 8 memperuntukkan seperti berikut:
>
> > Every marriage solemnised in Malaysia, after the appointed date, other than a marriage which is void under the Act, shall continue until dissolve:
> >
> > (a) by death of one of the parties
> >
> > (b) by the order of a court of competent jurisdiction, or
> >
> > (c) by a decree made by a court of competent jurisdiction that the marriage is null and void.
>
> Berdasarkan peruntukan s 8 Akta tersebut, saya berpendapat meskipun plaintif dan defendan tidak lagi tinggal bersama ataupun meneruskan kehidupan mereka sebagai suami isteri setelah defendan memeluk agama Islam, perkahwinan mereka dianggap berterusan sehinggalah ianya dibubarkan di bawah mana-mana keadaan di bawah s 8 Akta tersebut. Dengan ini defendan masih tertakluk kepada bidang kuasa mahkamah ini. Tambahan pula permohonan plaintif di sini ialah berkaitan hak jagaan dan kebajikan anak-anak serta nafkah. Sudah tentu plaintif tidak boleh lari dari tanggungjawabnya untuk menanggung anak-anak tersebut. (Emphasis added.)

[26] In *Yong Fuat Meng v Chin Yoon Kew* [2008] 5 MLJ 226; [2008] 5 CLJ 705, the issue in this case again concerns which court has jurisdiction over

parties who had contracted civil marriage and over children of the civil marriage. The High Court ruled that the status of the parties at the time of the marriage is the material consideration for the purpose of determining the question of jurisdiction. The court further held that as the petitioner is not a born Muslim, under the Islamic personal law, there is no prohibition for the petitioner to appear before the civil court to settle his obligations and/or liabilities as required by the law which he himself has previously subscribed to by contracting a civil marriage under LRA 1976.

[27] Thus, our courts have consistently held that s 3(3) does not apply to Muslims or Muslim marriages but the converted spouse cannot use his or her conversion to Islam to avoid responsibilities under Act 164.

[28] It is noteworthy that none of the cases cited above was canvassed in the GOJ. We would like to think that the learned judge might have arrived at a different view had there been references made to the cases cited above. After all, the Supreme Court and the Federal Court decisions bind the High Court and this court by the application of the principle of doctrine of stare decisis the principle of which is well defined in law. Both this Appeal and Appeal 2332 can be disposed of on this ground alone. We shall nevertheless proceed to show why the court below had erred in the construction of the said provision.

[29] The crux of the respondent's case is as follows. Subsection 3(3) of Act 164 should be not construed to mean that Act 164 shall not apply to Muslims but must be read in the context of Muslim marriages. The term 'Muslim' cannot be read in a vacuum. The reason being since Act 164 governs marriages and divorces, any reference to the word 'Muslim' must necessarily refer to a Muslim who is married under Islamic Law. This interpretation is consistent with the fact that Muslim marriages in Malaysia is a State matter, governed by the Syariah principles and any issues arising therein will be dealt by the Syariah Courts. Reference was made on the Federal Court case of *Latifah bte Mat Zin v Rosmawati Bte Sharibun & Anor* [2007] 5 MLJ 101. Muslim marriages would not fall within the purview of the Act 164 and to that extent, it is Muslim marriages and not Muslims, that is exempted from the said Act. The words 'This Act shall not apply to a Muslim ...', cannot be left at that as there is no reason for Parliament to exclude a Muslim from the Act 164. It cannot be that on the ground of religion alone, the civil court will lose its jurisdiction to hear the allegation of adultery against the appellant. Whether the appellant should be condemned for having committed adultery has nothing to do with her personal law. Therefore Act 164 and in particular s 58 does not exclude the appellant from being cited as a party for the alleged adultery and whether she should be condemned in damages.

[30] The learned judge agreed with the position taken by the respondent. In

applying the principle of *noscitur a sociis* (meaning 'it is known from its associates') which requires that the terms be construed in the light of the surrounding words (reference was made to Francis Bennion's book *Understanding Common Law Legislation: Drafting and Interpretation*, Oxford University Press, Reprinted 2013) and in making references to the Hansard, among others, Her Ladyship concluded that Act 164 does not apply to a Muslim who is married under the Islamic Law or to a non-Muslim and Muslim married under the Islamic Law. It follows that Act 164 applies to a Muslim who is alleged to have committed adultery with a non-Muslim.

THE RULES OF INTERPRETATION

[31] Understanding the rules of interpretation will facilitate interpretative task. We are of the view that the construction undertaken by the learned judge does not appear to be consistent with the established principle of construction of statutes that we understand it to be.

[32] Case authorities and text books on construction of statutes have laid down established principles on how judges as judicial interpreters are to interpret the laws. In interpreting the law, if the court finds that the law has ambiguities, the court can always call in aid the rules of interpretations commonly referred to as cannons of construction. They are the literal rule, the golden rule, the mischief rule and the purposive rule.

[33] It is important to bear in mind that the court should begin the task of interpreting interpretative issues by using the ordinary meaning rule or the plain meaning rule, commonly referred to as the literal interpretation. The ordinary and plain meaning rules pay attention to nothing more and nothing than the actual words used by the statute (per the words of Gopal Sri Ram JCA (as he then was) in *Citibank Bhd v Mohamad Khalid bin Farzalur Rahaman & Ors* [2000] 4 MLJ 96; [2000] 3 CLJ 739).

[34] In this regard, NS Bindra's on *Interpretation of Statutes* (10th Ed) explained at pp 438–439:

> In constructing a statutory provision, the first and foremost rule of construction is the literary construction. All that we have to see at the very outset is what that provision says. If the provision is unambiguous, and if from that provision the intent is clear, we need not call into aid the other rules of the construction of statutes. The other rules of construction of statute are called into aid only when the legislative intention is not clear. When the language of a statute is plain and unambiguous, that is to say, admits but of one meaning, there is no occasion for construction.
>
> The task of interpretation can hardly be said to arise in such a case. The most common rule of statutory interpretation is the rule that a statute, clear and

> unambiguous on its face, need not and cannot be interpreted by a court, and only those statutes which are ambiguous and of doubtful meaning, are subject to the process of statutory interpretation. It is not allowable to interpret what has no need of interpretation. Absoluta sentantia expositore non indigent — plain words need no exposition. Such language best declares, without more, the intention of the law-giver, and is decisive of it. Moreover, no question of main interpretation arises when the court does not interpret the words used by the legislative.
>
> Where the words of the statute are clear enough, it is not for the courts to 'travel beyond the permissible limit' under the doctrine of implementing legislative intention.

[35] Similar stance was taken by the Federal Court in *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97; [2006] 4 CLJ 195. In this case, The appellant obtained leave to appeal on the following issue:

> Whether an Advocate and Solicitor within the meaning of the Legal Profession Act 1976 who has not been practising for seven years preceding his appointment is qualified to be appointed as Chairman of the Industrial Court under s 23A Industrial Relations Act 1967.

The Federal Court ruled that the correct meaning to be accorded to the words 'advocate and solicitor in s 23A(1)' involved a question of statutory interpretation the immediate concern of which was the nature and effect of s 17A of the Interpretation Acts 1948 And 1967 (Act 388 but made the following remark:

> The choice prescribed in s 17A of '... A construction that would promote the purpose or object underlying the Act ... shall be preferred to a construction that would not promote that purpose or object ...' can only arise when the meaning of a statutory provision is not plain and is ambiguous. *If, therefore, the language of a provision is plain and unambiguous s 17A will have no application as the question of another meaning will not arise.* Thus it is only when a provision is capable of bearing two or more different meanings can s 17A be resorted to in order to determine the one that will promote the purpose or object of the provision. Such an exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative recognition of the purposive approach and is in line with the current trend in statutory interpretation. (Emphasis added.)

[36] The Federal Court did not say that the pendulum had swung towards a purposive approach. The Federal Court was clear that the purposive approach as set out in s 17A of Act 388 only applies when the plain meaning is in doubt and not otherwise.

[37] The House of Lords in the case of *Pinner v Everett* [1969] 3 All ER 257 at pp 258–259 even warned against substituting some other words for the words of the statute. In this regard, the House of Lords held as follows:

> In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute.

[38] It is equally important to appreciate that when interpreting an interpretative issue, one must read and construe the law as a whole and in the context of the law. Construed as a whole means the whole and every part of the statute must be taken into consideration in determining the meaning of any of its part. Different sections and provisions relating to the same subject must be construed together and read in the light of each other. The court must not confine its attention only to the particular provision which requires its consideration (see *Lembaga Minyak Sawit Malaysia v Arunamari Plantations Sdn Bhd & Ors and another appeal* [2015] 4 MLJ 701; [2015] 7 CLJ 149).

[39] Section 3 is an application section. Eminent author in drafting legislation GC Thornton in his book *Legislative Drafting* (4th Ed) at p 482; 212 said that the purpose of an application provision is to draw the boundaries of the scope of the legislation with precision. We say that s 3 of Act 164 has drawn the boundaries of the application with precision and clarity.

[40] Section 3 reads:

> 3 *Application*
>
> (1) Except as is otherwise expressly provided this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia.
>
> (2) For the purposes of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia.
>
> (3) This Act shall not apply to a Muslim or to any person who is married under Islamic law and no marriage of one of the parties which professes the religion of Islam shall be solemnized or registered under this Act; but nothing herein shall be construed to prevent a court from having exclusive jurisdiction over the dissolution of a marriage and all matters incidental thereto including granting a decree of divorce or other orders under Part VII and Part VIII on a petition for divorce under section 53 where one party converts to Islam after the filing of the petition or after the pronouncement of a decree, or a petition for divorce under either section 51, 52 or 53 on the petition of either party or both parties to a marriage where one party has converted to Islam, and such decree and orders made shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam.

(4) This Act shall not apply to any native of Sabah or Sarawak or any aborigine of West Malaysia whose marriage and divorce is governed by native customary law or aboriginal custom unless —

(a) he elects to marry under thus Act;

(b) he contracted his marriage under the Christian Marriage Ordinance [*Sabah Cap. 24*]; or

(c) he contracted his marriage under the Church and Civil Marriage Ordinance [*Sarawak Cap. 92*].

[41] Subsection 3(3) can be dissected into three parts:

(a) the first part provides that Act 164 shall not apply to a Muslim;

(b) the second part provides that Act 164 shall not apply to any person who is married under Islamic Law and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act; and

(c) the third part provides that Act 164 will however apply as against a party who was married under the provisions of Act 164 and who subsequently converts to Islam, and the court can grant a decree of divorce and makes orders under Part VII and Part VIII of Act 164. This is an exception provision.

[42] It is our view, the clear, categoric and mandatory language of the first part of sub-s 3(3) is a blanket exclusion of Muslims from the entire Act 164. In other words, sub-s 3(3) of Act 164 excludes the legislation entirely, including s 58, as against Muslims whether in relation to marriage or divorce or in any manner whatsoever. In short, the civil court do not have jurisdiction over Muslims by virtue of this provision.

[43] The second part of sub-s 3(3) covers the Muslim marriages under the Islamic Law and if one party of the marriage is a Muslim (see *Zubeydah Shaik Mohd*). In similar vein, the civil court do not have jurisdiction over Muslim marriages.

[44] The only exception where the civil court will have jurisdiction over a Muslim is expressly set out in the third part, ie where it is a non-Muslim who, subsequent to their civil marriage, has converted to Islam. The express exception is only in that limited circumstances where one non-Muslim party to a non-Muslim marriage has converted to Islam, that the court has jurisdiction to grant a decree of divorce and other orders under Part VII and Part VIII of Act 164 and that 'such decree and orders made shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam'.

[45] The above is the ordinary and plain meaning of sub-s 3(3) of Act and from the decided cases that we had averted to, there cannot be any other meaning attributed to it.

[46] We wish to refer to the case of *Tan Sung Mooi (F) v Too Miew Kim*, where the application section was dealt with at length by the Supreme Court. In that case, the parties were married according to Chinese customary rites on 20 February 1964. On a petition by the wife, the High Court dissolved the marriage on 17 December 1991 and granted a decree nisi to be made absolute after three months on the ground that the marriage had irretrievably broken down. Pending the decree nisi being made absolute, the petitioner filed an application under ss 76–77 of Act 164 for an order of division of matrimonial assets and for maintenance. The respondent opposed the application on the grounds that the High Court had no jurisdiction over him with respect to the ancillary relief arising from the divorce because of his conversion to Islam on 9 January 1993. On an application for reference to the Supreme Court under s 48 of the Courts of Judicature Act 1964, the learned judicial commissioner referred the following questions for the opinion of the Supreme Court:

(a) is s 3 of the Act unconstitutional, in the light of arts 11(1) and 121(1A) of the Federal Constitution? and

(b) is the High Court entitled to exercise its continuing jurisdiction to grant ancillary relief, in view of the fact that the High Court had dissolved the marriage?

[47] The respondent contended that being a Muslim, the High Court no longer had jurisdiction over him in view of s 3(3) of Act 174 and that only the Syariah Court had jurisdiction in respect of matters ancillary to the divorce. The petitioner, on the other hand, contended that since she remained a non-Muslim, she could not come under the jurisdiction of the Syariah Court. Hence, the High Court should continue to exercise its jurisdiction in the matter. In this regard, she contended that s 3(3) was unconstitutional insofar as it prevented the High Court from granting her the order for ancillary reliefs, as she would effectively have no remedy in law against the respondent.

[48] The Supreme Court answered the above question (1) in the negative and question (2) in the affirmative.

[49] On question (2), based on the facts in this reference, the Supreme Court confirmed that the High Court has jurisdiction to hear the petitioner's application for ancillary reliefs under the Act, notwithstanding the respondent's conversion to Islam after the divorce.

[50] Mohamed Dzaiddin bin Hj Abdullah SCJ (as he then was) delivering

the decision of the Supreme Court explained at p 712 the reasons why the apex court formed the opinion that the High Court has jurisdiction to continue to hear the application despite ruling that s 3(3) does not apply to Muslim:

> ... There are two main reasons why we form the opinion that, on the facts of the reference, the High Court has jurisdiction to continue to hear the application.
>
> Section 3 of the Act states as follows:
>
> (1) Except as is otherwise expressly provided this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia.
>
> (2) For the purposes of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia.
>
> (3) *This Act shall not apply to a Muslim* or to any person who is married under Muslim law and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act; but nothing herein shall be construed to prevent a Court before which a petition for divorce has been made under s 51 from granting a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam, and such decree shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam. (Emphasis added.)
>
> (4) ...
>
> The purpose for which the Act was enacted is set out in the title which is 'an Act to provide for monogamous marriages and the solemnisation and registration of such marriages; to amend and consolidate the law relating to divorce and to provide for matters incidental thereto.' Parts III and IV of the Act deal with marriages and solemnisation and registration of marriages. It should be noted that s 48 stipulates that nothing in the Act shall authorise the Court to make a decree of divorce except where the marriage has been registered or deemed to be registered under the Act or where the marriage between the parties was contracted under a law providing for monogamous marriage. This section seems to fortify the legislative purpose as set out in the title of the Act. Next, we have Part VI, comprising, inter alia, ss 51 and 53, which deal with divorce.
>
> The legislative intention of s 3 must be construed within the framework and the general purpose of the Act. With that in mind, the Legislature by enacting s 3 clearly intended to specify the persons to whom the Act applies or does not apply. Thus, by s 3(1), except as otherwise expressly provided, the Act applies to all persons in Malaysia and those domiciled in Malaysia. section 3(3) provides that the Act shall not apply to Muslims or Muslim marriages and that only non-Muslim marriages may be solemnised or registered. This clearly means that the Act only applies to non-Muslims and non-Muslim marriages ...

His Lordship further said —

> In the present reference, it is common ground that both parties were non-Muslims who contracted a non-Muslim marriage. The High Court

dissolved the said marriage and thereafter the petitioner filed an ancillary application under ss 76 and 77 of the Act. From the facts above, it is without doubt that the Act applies to them since they were non-Muslims. It follows that as the petitioner's application under ss 76 and 77 concerned matters affecting both parties' legal obligations as non-Muslims and incidental to the granting of the divorce, the High Court would have jurisdiction to hear and determine the ancillary application. For the above reasons, we cannot agree with the respondent's contention that in view of the opening words of sub-section (3) that 'The Act shall not apply to a Muslim ...', the High Court ceased to have jurisdiction over him upon his conversion to Islam. It is noted that the High Court exercised its jurisdiction in this matter under s 24(a) of the Courts of Judicature Act 1964 which states that the jurisdiction of the High Court shall include:

(a) jurisdiction under any written law relating to divorce and matrimonial matters

In our opinion, the words 'any written law relating to divorce and matrimonial matters' must include the Act because the High Court may derive jurisdiction in matrimonial matters under some other law, eg under s 9, the Married Women and Children Maintenance Act 1950 (Revised 1981).

[51] Thus, the reason why the High Court still has jurisdiction to hear the ancillary application was because both the petitioner and the respondent were non-Muslims who contracted a non-Muslim marriage. It follows that despite the respondent's conversion to Islam, he cannot avail himself of the opening words of sub-s (3) that 'The Act shall not apply to a Muslim ...', because he had legal obligations under his non-Muslim marriage which cannot be extinguished or avoided by his conversion to Islam.

[52] The facts in *Tan Sung Mooi v Too Miew Kim,* is far different from the facts in the present case. The appellant in this Appeal is a Muslim since birth. She was never a non-Muslim party in a non-Muslim marriage at any time. The issue of conversion is wholly irrelevant.

[53] Turning back to sub-s 3(3) of Act 164, it is without doubt that the language of the said provision is plain, unambiguous and unequivocal. There is nothing difficult about understanding the language used.

[54] Equally clear is the purpose for which Act 164 was enacted as stipulated in the long title which reads 'an Act to provide for monogamous marriages and the solemnisation and registration of such marriages; to amend and consolidate the law relating to divorce and to provide for matters incidental thereto'.

[55] Thus the legislative intent of sub-s 3(3) must be construed within the framework and the general purpose as stipulated in the long title to Act 164

which is to specify the persons to whom the Act applies or does not apply (see *Tan Sung Mooi v Too Miew Kim*). A

[56] By reason of the appellant's assertion that Act 164 does not apply to her as a Muslim, Her Ladyship is called upon to construe the words 'This Act shall not apply to a Muslim'. B

[57] The first and foremost rule of construction that should have been considered by the learned judge is the literal interpretation. She should have given the words their ordinary and plain meanings. But she did not. C

[58] The learned judge had instead chosen to embark on the purposive approach. There was no reason given the learned judge why the purposive approach was used. The learned judge took into consideration the juridical nature of an enactment, the plain meaning rule and the common sense rule, traced the history leading to the enactment of Act 164 with reference was made to observation by Thompson LP the Federal Court cases of *Re Ding Do Ca* [1966] 2 MLJ 220 on the need for the Legislature to look at the personal law of non-Muslim in Malaysia relating to marriage, divorce and succession, the setting up of the Royal Commission on Non-Muslim Marriage and Divorce Laws in 1971 (the Royal Commission), the tabling of the Law Reform (Marriage and Divorce) Bill in Parliament in 1972 and the statement made by the Minister of Law in the Parliamentary debate in the Second and Third Reading of the Bill. D E F

[59] We observed there was quite a heavy reliance on the rule of construction of *noscitur a sociis*. Premised on this approach, the interpretation of sub-s 3(3) can be found in paras 18–20 of the GOJ as reproduced below: G

> [18] In the instant case, the words 'to a Muslim or to any person' in section 3 (3) of the LRA is an example of words in pair with different and overlapping meanings: 'Muslim' means a person who professes the religion of Islam and 'any person' can mean a person who is a Muslim. It can also mean a person who is a non-Muslim.
>
> [19] Applying the principle of *noscitur a sociis*, the close proximity of the words 'a Muslim or to any person' with the phrase 'who is married under Islamic law' means that the LRA does not apply to a Muslim who is married under Islamic law and to any person who is married under Islamic law. The word 'any person' is paired with 'Muslim' to cover situations where a person who may not be a Muslim is married to a Muslim under Islamic law. In such situations where a Muslim and a Muslim, or a Muslim and non-Muslim are married under Islamic law, the LRA does not apply to them. While Muslims in Malaysia are not permitted under the Syariah laws to marry a non-Muslim, such marriages are permitted in many countries.
>
> [20] Accordingly, the phrase 'no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act' in section 3(3) of the LRA, means that marriages between a Muslim and a Muslim and non-Muslim

H I

cannot be solemnised or registered under the LRA.

[60] And the learned judge gave the following interpretation:

> [29] Therefore, it can be said with certainty that the LRA was enacted to govern the marriage and divorce of non-Muslims in Malaysia and that it expressly excludes the marriage and divorce of Muslims and Muslims married with any person under Islamic law.
>
> [30] Even the recent amendment to s 3(3) of the LRA by the Law Reform (Marriage and Divorce) (Amendment) Act 2017 (Act A1546) (the '2017 Amendment Act'), which took effect from 15 December 2018, did not extend the LRA to marriages and divorces by Muslims. The 2017 Amendment Act extended the LRA to divorces of non-Muslims who had married under LRA or deemed married under LRA where one spouse after the marriage converts to Islam, either after the filing of the petition or after the pronouncement of a decree, or a petition for divorce under the LRA. Notwithstanding the amendment to s 51 and the introduction of s 51A by the 2017 Amendment Act, the LRA still does not apply to Muslims who are married under the Islamic law or any person who is married under Islamic law.

[61] We say that the interpretation of the words 'This Act shall not apply to a Muslim' must necessarily mean the Muslim marriages, is erroneous. This is especially so in light of the fact that reference was made by the learned judge to the statement made by the Minister of Law in the Parliamentary debate in the Second and Third Reading of the Bill.

[62] We had carefully perused through the relevant Hansard and we agreed with learned counsel for the appellant that the learned judge has failed to take into account the important fact that the original Bill the Law Reform (Marriage and Divorce) Bill 1972 proposed by the Royal Commission headed by Tan Sri Ong Hock Thye tabled on 4 December 1972 was withdrawn and was referred to a Joint Select Committee of both Houses of Parliament (Joint Select Committee) under the Chairmanship of Tan Sri Abdul Kadir bin Yusof. The Draft Bill of 1972 was amended and the final Bill ie the Law Reform (Marriage and Divorce) Bill 1975 (1975 Bill) was tabled in July 1975. The amendment was intentionally and expressly to exclude the application of Act 164 to all Muslims.

[63] The extracts from the Hansard on the sitting of the Parliament as reproduced below is telling.

[64] During the sitting on 4 November 1975, during the second reading of the 1975 Bill, the Minister of Law and the Attorney General said:

> Rang Undang-undang yang dibentangkan ini berbeza dengan draft undang-undang yang dikemukakan oleh Suruhanjaya Di Raja pada satu perkara

yang penting, iaitu Fasal 3 (2) daripada draft undang-undang Suruhanjaya Di Raja asal yang berbunyi begini:

> 3(2) This Act shall not apply to any person who is married under Muslim law:
>
> Provided that any person, being originally a non-Muslim to whom the provisions of section 5, 6, 7 and 8 of this Act apply, shall continue, notwithstanding the conversion of such person to Islam, to be subject to all the provisions of this Act.'

Fasal ini , Tuan Yang di-Pertua, telah dideraf semula oleh Jawatankuasa yang saya sendiri ketuai dan berbunyi seperti berikut:

> 3(3) This Act shall not apply to Muslims or to any person who is married under Muslim law; and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act.

[65] The above show that the exemption of 'Muslim' was added as a separate category in cl 3(3) of the 1975 Bill. This distinguished distinctly the words 'Muslim' and 'Muslim marriages'.

[66] The Hansard further shows that Datuk Athi Nahappan, the then Deputy Minister of Laws, in his reply at the end of the second reading of the 1975 Bill on 7 November 1975 said:

> The Honourable Member for Panti said that the provisions of Sub-clause (3) of Clause 3 is not clear. The purpose of this provision is to make it clear beyond doubt that the Act will not apply to Muslims or to any person who is married under the Muslim law. The term Muslim law is rendered in Bahasa Malaysia as Hukum Syarak.
>
> ...
>
> Sir, I think it is appropriate for me to consider a little more the effects of Clause 51 and Clause of the Bill. *Again in this Clause 3, reference is made to the exclusion of the application of this Act to Muslims. This was merely to make it very, very clear — no room for doubt — and that it is full of certainty, so that it will allay any kind of fear that this law, directly or indirectly, will allow a Muslim to take benefit of this Act. So to make it very clear, it excludes the application of this law to Muslims and I am sure that this would be acceptable to the Muslim society as a whole – to make it doubly sure by express provision*.
>
> The Honourable Member for Panti did point out that the first part 'This Act shall not apply to Muslims' was clear to him but he could not understand the second alternative 'or to any person who is married under Muslim law'. Actually, this is again a subtlety and clarification. *This first part merely says 'This Act shall not apply to Muslims' generally — Muslims of all ages including a minor.* A minor cannot marry, a minor of 10 years, for instance. A child cannot marry but still the minors' interest are covered here — custody and other things. Therefore, no Muslim can have any resort to this law as such.

> *The second part applies to a person who is married under the Muslim law.* A person can only marry under Muslim law if he is a Muslim. It is understood; it is implied. This comes into play when the marriage takes place. *The first part is whether he is married or not married, the provisions will not be applicable to him; this is the reason for the alternative provision. So, Sir, Clause 3 clearly excludes Muslims. It says 'This Act shall not apply'* but under Clause 51, the wife can file divorce proceedings against the husband. It would appear that it is an exception to Clause 3 (3) and this limited exception is given to the wife as discretion. If she wants, she can; if she does not want, she need not. (Emphasis added.)

[67] We cautioned ourselves that in construing a statute, Hansard is only an aid to interpretation and could not be determinative of the issue for that would amount to substituting the words of the Minister for the words of the statute. However, we find nothing of that sort here. The statement by the Deputy Minister undoubtedly clarified with certainty the legislative intent of sub-s 3(3) of Act 164 consistent with the words of the statute.

[68] Given the aforesaid, the interpretation of sub-s 3(3) by the learned judge obviously ran contrary to the legislative intent of the Parliament.

[69] The error could have been avoided if the learned judge in the first place, had undertaken the literal interpretation, as did the Supreme Court in *Tan Sung Mooi v Too Miew Kim.* Nowhere in the reported case does it show that the Supreme Court imported or deployed any rule other for interpretation in construing the words 'This Act shall not apply to a Muslim' in sub-s 3(3). If that was the approach, the learned judge would have come to the decision that the words admits to only one meaning, as so held by the Supreme Court in *Tan Sung Mooi v Too Miew Kim* and the cases that we had mentioned, and that is Act 164 does not apply to a Muslim.

[70] This is further fortified by the word 'or' appearing immediately after the words 'This Act shall not apply to a Muslim' and before the words 'to any person who is married under Islamic law'. It is to be noted that the Hansard showed that the Deputy Minister had used the word 'alternative provision', which by necessary implication, was in reference to the very word 'or'.

[71] The learned judge was plainly wrong when she failed to give due consideration to the word 'or'. It is important to bear in mind in interpreting interpretative issue, every word and provision found in a statute is supposed to have a meaning and a function and for some useful purpose. Parliament does not waste its words or to say anything in vain. Thus any argument on any words or provisions in sub-s 3(3) being superfluous is untenable. In *All Malayan Estates Staff Union*, the Federal Court remarked at p 213:

> [9] ... In *The King v Berchet* [1688] 1 Show 106 it was held that it is a well-known

rule in the interpretation of statutes that such a sense is to be made upon the whole so that no clause, sentence or word shall prove superfluous, void or insignificant if by any other construction they may all be useful and pertinent. Thus, it is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute (see *Aswini Kumar Ghose v Arabinda Bose AIR* [1952] SC 369).

[72] The Supreme Court decision in the case of *Majlis Peguam & Anor v Tan Sri Dato' Mohamed Yusoff bin Mohamed* [1997] 2 MLJ 271; [1997] 3 CLJ 332 is also instructive:

In interpreting any statutory provision, no words used by Parliament should be construed as superfluous and of no effect whatsoever simply to enable the Courts to rewrite the Legislative plain language. In our view, the doctrine of absurdity and redundancy in legislative words must be applied with the utmost caution, and it must not be applied when an explanation can in fact be found for such words.

(see also Deridger on the *Construction of Statutes*, 3rd Ed at p 155 and *NS Bindra's Interpretation of Statutes*, at p 164).

[73] We agreed with learned counsel for the appellant that the word 'or' means that the two phrases must be read disjunctively. We find support in the following authorities.

[74] In Federal Court case of *Tenaga Nasional Bhd v Pearl Island Resort Development Sdn Bhd* [2017] MLJU 1193; [2017] 9 CLJ 185, the issue was over the interpretation of s 26(2) of the Limitation Act 1953, whether for the purpose of s 26(2) of the Limitation Act 1953, the words 'person liable or accountable therefor ... makes any payment in respect thereof ' covers both the principal debtor and or guarantor / surety in respect of the debt due and owing by the principal debtor. The Federal Court held at p 200:

[40] Now, consider s 26(2) of the Act. The first thing to note is that s 26(2) of the Act uses the word 'person', which is a wider term, instead of the 'debtor'. This manifests a clear intention of the Legislature that the person liable or the person accountable under s 26(2) of the Act may or may not be the principal debtor. It is plain and obvious that the said phrase covers a third party (other than the principal debtor) who makes payment in respect of the debt. Secondly, the phrase the person liable or accountable therefor should be read disjunctively as s 26(2) of the Act uses the word 'or' instead of the word 'and'.

[75] The Federal Court in *Malaysia Building Society Bhd v KCSB Konsortium Sdn Bhd* [2017] 2 MLJ 557; [2017] 4 CLJ 24 involved the interpretation of s 340(2)(b) of the National Land Code. Arifin Zakaria CJ held at p 34:

A [21] ...

What s 340(2) provides is that the title or interest or any person referred to in sub-s (1) is rendered defeasible when the registration was obtained by forgery, or by means of an 'insufficient 'or 'void' instrument. In the present case forgery is not an issue. We are, therefore, left with 'insufficient' or 'void' instrument. Haidar J (as he then B was) had in the case of *Tan Tock Kwee & Anor v Tey Siew Cha & Anor* [1995] 4 CLJ 658, rightly ruled that the words 'insufficient' or 'void' appearing in s 340(2)(b) of the NLC ought to be read disjunctively. We agree with Haidar J that because of the conjunctive 'or' appearing between the words 'insufficient' and 'void' in s 340(2)(b) of the NLC, therefore, the two words must be read disjunctively and not C conjunctively.

[76] By reading it disjunctively, it is by no means clear that the first part refers to a Muslim, whether he or she is married or not. The second part refers to a person who is married under the Muslim law. The Deputy Minister had D clearly distinguished between the first part and the second part as per the excerpts shown in para 66 of this judgment.

[77] In the circumstances, we are of the view that in the face of an express E provisions to exclude the appellant from the application of Act 164, there is no legal basis for the learned judge to say that it may not have been in the contemplation of Parliament when it enacted Act 164 of a state of affairs where a married non-Muslim commits adultery with a Muslim. Likewise, there is also no legal basis to presume that Parliament did not intend to exclude from Act F 164 the ability to seek damages from adulterers in a divorce petition, just by reason of their religion or that Parliament does not intend to legislate in violation of any rights under the Federal Constitution. Even the issue of absurdity raised by learned counsel for the respondent does not arise. As stated by the Deputy Minister, the exclusion of the application of this Act to Muslims G was to make it doubly sure by express provision.

[78] It is not unreasonable for us to conclude that the meaning of the ordinary and plain words 'This Act shall not apply to a Muslim', have been strained to such an extent so as to deprive the appellant from taking refuge H under sub-s 3(3). The rule of construction of *noscitur a sociis* may be useful in other contexts but not for the present purpose when the words of the statute clearly speaks the intention of the Legislature (*Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2008] MLJU 646; [2008] 6 CLJ 209). The court is entrusted to interpret the law passed by Parliament as it stands and no other. I The learned judge had used the purposive approach to arrive at an interpretation manifestly not intended to by Parliament and in doing so, had rewritten or substituted words in sub-s 3(3) with words not in existence. To borrow the words of NS Bindra's — 'Where the words of the statute are clear enough, it is not for the courts to 'travel beyond the permissible limit' under the

doctrine of implementing legislative intention'.

[79] We understand the concern of learned counsel for the respondent in this regard. The result may sound harsh, unjust or undesirable but decided cases demonstrated that the judicial policy of this country is not to usurp the legislative role of Parliament but confined the province of the courts only to expounding the law. HRH Raja Azlan Shah (as His Majesty then was) in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 ruled that the question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meant for judicial determination.

[80] In *Manokaram Subramaniam*, Arifin Zakaria FJC (as he then was) expressed the court's reluctance to interfere with the legislative power as shown in the excerpt below:

> [39] Finally, I must say that this case clearly demonstrates the harsh result arising from the current provisions of s 76(1) and (3) of the Act. But, as I find the words in s 76(1) and (3) are clear and explicit, it is our duty to give effect to it; for in that case the words of the statute speaks the intention of the legislature. (See *Warburton v Loveland* (1832) 2 D & Cl 480 per Tindal CJ at p 489). If the result is unfortunate, it is entirely within the power of the legislature to take the necessary action to remedy the defects of the law as enacted, and it is not for the courts to usurp the function of the legislature by straining the meaning of the clear terms of the law seeking to evade the consequences which may ensue. That was precisely what was done by Singapore by enacting the new s 112 of the Women's Charter.

[81] The English Court of Appeal in the case of *McCormick v Horsepower Ltd* [1981] 1 WLR 993 held that:

> The meaning of the words is plain and must be applied by the courts even though results might follow which some, perhaps many, may consider undesirable ...

[82] We are duty bound to give effect to the clear and explicit words of sub-s 3(3) of Act 164. As observed by Arifin Zakaria FCJ (as he then was) in *Manokaram Subramaniam*, if the result is unfortunate, it is entirely within the power of the Legislature to take the necessary action to remedy the defects of the law as enacted, and it is not for the courts to usurp the function of the legislature by straining the meaning of the clear terms of the law seeking to evade the consequences which may ensue. The making or unmaking of the law is a matter within the exclusive domain of Parliament (per Low Hop Bing in *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507).

[83] We therefore allowed Appeal 2417 with costs and set aside the order of the High Court dated 27 November 2019.

A **[84]** Consequent to our decision in Appeal 2417, Appeal 2332 has become redundant. Therefore, there is no necessity to delve further into the matters raised in this appeal. The only exception provided in sub-s 3(3) of Act 164, at the risk of repeating, is in relation to the conversion of one party to a civil marriage so that his/her legal obligations under his/her non-Muslim marriage
B would not be extinguished or avoided by his or her conversion to Islam. The exception in sub-s 3(3) does not extend to s 58. We therefore dismissed Appeal 2332 with cost.

Appeal 2417 allowed with costs, appeal 2332 dismissed with costs.

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Reported by K Selvaraju

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